

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CHERIE BALLEW, Individually and
on behalf of others similarly situated,

Plaintiff,

v.

MATRIX INITIATIVES, INC., a
Delaware Corporation, ZICAM, LLC,
an Arizona Limited Liability
Corporation,

Defendant.

NO. CV-07-267-RHW

**ORDER DENYING THE
PARTIES' JOINT MOTION FOR
ENTRY OF AGREED
PROTECTIVE ORDER**

Before the Court is the parties' Joint Motion for Entry of Agreed Protective Order (Ct. Rec. 15). The motion was heard without oral argument.

The parties ask the Court to enter their proposed Stipulated Protective Order, which would allow the parties to designate as "confidential" materials trade secrets, or other confidential or proprietary research, development, manufacturing or commercial or business information, including customer names, proprietary information, clinical studies, information concerning competitors, production information, personnel records, information submitted to any governmental or regulatory agency which is exempt from public disclosure, personal information of a sensitive nature, and non-public sales and profits information.

Once a document receives such a designation, it is subject to the special rules set forth in the protective order that cover the dissemination and use of the

1 specified document or information. The proposed protective order also states that
2 if the designated material is to be included in any papers filed with the Court, it
3 must be filed under seal until further order from the Court and provides for
4 sanctions imposed by the Court for disclosure of designated materials other than in
5 accordance with the terms of the protective order. The terms of the protective
6 order are to remain in effect indefinitely.

7 Generally, the manner in which the parties agree to manage the
8 dissemination and use of the information between themselves during the discovery
9 process does not cause the Court concern. The parties' proposed protective order,
10 however, does more than manage the dissemination and use of certain materials
11 during the discovery process. This proposed order attempts to restrict the access of
12 the public to documents that would be part of court proceedings and, as such,
13 requires the Court to inquire further into whether the proposed protective order
14 impedes the public's common law right to access court proceedings and the First
15 Amendment's protection of the same.

16 The public should be allowed access to litigation documents and information
17 produced during discovery unless the party opposing disclosure shows "good
18 cause" why a protective order is necessary. *Phillips v. General Motors Corp.*, 307
19 F.3d 1206, 1210 (9th Cir. 2002); *see also San Jose Mercury News, Inc. v. United*
20 *States Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999) ("It is well-established that
21 the fruits of pre-trial discovery are, in the absence of a court order to the contrary,
22 presumptively public. Rule 26(c) authorizes a district court to override this
23 presumption where 'good cause' is shown."); *In re Agent Orange Product Liability*
24 *Litig.*, 821 F.2d 139, 145 (2d Cir.1987) ("[I]f good cause is not shown, the
25 discovery materials in question should not receive judicial protection and therefore
26 would be open to the public.").

27 On the other hand, Fed. R. Civ. P. 26(c) gives district courts broad latitude to
28 grant protective orders to prevent disclosure of many types of information.

1 *Phillips*, 307 F.3d at 1211 (noting that rule 26(c) authorizes district courts to issue
 2 “any order which justice requires to protect a party or person from annoyance,
 3 embarrassment, oppression, or undue burden.” (Emphasis in original.) Fed. R. Civ.
 4 P. 26(c) requires, however, that the party asserting good cause bear the burden, for
 5 each particular document it seeks to protect, of showing that specific prejudice or
 6 harm will result if no protective order is granted. *Foltz v. State Farm Mut. Auto.*
 7 *Insur. Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003).

8 Even if the Court were to find that “good cause” exists, it still must consider
 9 the public’s common law right of access. The public has a federal common law
 10 right of access to all information filed with the Court, which in turn “‘creates a
 11 strong presumption in favor of access’ to judicial documents which ‘can be
 12 overcome’ only by showing ‘sufficiently important countervailing interests.’”
 13 *Phillips*, 307 F.3d at 1212, quoting *San Jose Mercury News, Inc. v. United States*
 14 *Dist. Court*, 187 F.3d 1096, 1102 (9th Cir. 1999). In deciding whether sufficient
 15 countervailing interests exist, courts are directed to look to the “‘public interest in
 16 understanding the judicial process and whether disclosure of the material could
 17 result in improper use of the material for scandalous or libelous purposes or
 18 infringement upon trade secrets.’” *Id.* at 1213, quoting *Hagestad v. Tragesser*, 49
 19 F.3d 1430, 1434 (9th Cir. 1999). Under Ninth Circuit precedent, the federal
 20 common law right of access does not apply to documents filed under seal, unless
 21 the document is attached to a dispositive motion. *Id.*¹ ; *Foltz*, 331 F.3d at 1136
 22 (holding that the presumption of access is not rebutted where documents subject to

24 ¹In *Phillips*, the Circuit recognized that in the case of nondispositive filings
 25 in which a document is filed under seal, the court has presumably already decided
 26 that the document deserved protection. Applying a strong presumption of access to
 27 the document would “undermine, and possibly eviscerate, the broad power of the
 28 district court to fashion protective orders.” *Phillips*, 307 F.3d at 1213.

1 a protective order are filed under seal as attachments to a dispositive motion). In
2 this case, the Court is hesitant to enter a blanket protective order that requires
3 documents to be filed under seal, which would then trump the common law right to
4 access, without a specific showing of good cause.

5 In addition, when deciding whether to enter a blanket protective order, the
6 Court also must consider the public's First Amendment rights. Under the First
7 Amendment, the public has a presumed right of access to court proceedings and
8 documents. *Oregonian Publ'g Co. v. United States Dist. Court for Dist. of*
9 *Oregon*, 920 F.2d 1462, 1465 (9th Cir. 1990). This presumed right can be
10 overcome only by an overriding right or interest "based on findings that closure is
11 essential to preserve higher values and is narrowly tailored to serve that interest."
12 *Id.*, quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1985).
13 "The interest is to be articulated along with findings specific enough that a
14 reviewing court can determine whether the closure order was properly entered."
15 *Id.*

16 Given both the public's common law right to access and the public's First
17 Amendment right of access to court proceedings and documents, the Court declines
18 to exercise its discretion to enter a protective order in this case which would
19 require documents to be filed under seal without a proper showing of good cause.
20 *See Foltz*, 331 F.3d at 1131 (commenting on the fact that blanket protective orders
21 make appellate review difficult). Indeed, it is the policy of this District and the
22 Judges therein not to enter blanket Protective Orders.

23 Accordingly, **IT IS HEREBY ORDERED:**

24 1. The parties' Joint Motion for Entry of Agreed Protective Order (Ct.
25 Rec. 15) is **DENIED**.

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**ORDER DENYING THE PARTIES' JOINT MOTION FOR ENTRY OF
AGREED PROTECTIVE ORDER ~ 4**

